Filed 5/13/19 Ehirim v. Cal. Dept. of Transportation CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DOMINIC OKECHUKWU EHIRIM, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.	E068675 (Super.Ct.No. CIVDS1505657) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed.

Dominic Okechukwu Ehirim, in pro. per., for Plaintiff and Appellant.

Jeanne E. Scherer, Chief Counsel, Jerald M. Montoya, Deputy Chief Counsel, and Desiri Schele, for Defendant and Respondent.

Dominic Okechukwu Ehirim sued his current employer, California Department of Transportation (CalTrans), for violations of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), invasion of privacy, and breach of fiduciary duty.

The claims for retaliation and hostile work environment under FEHA were tried to a jury, and the trial court granted CalTrans's motion for nonsuit after the presentation of Ehirim's case-in-chief. Ehirim appeals, contending that the nonsuit motion was granted in error. He also questions the overall fairness of the trial and challenges several pretrial decisions granting CalTrans's motions in limine.

We affirm. The nonsuit motion was properly granted because Ehirim failed to produce sufficient evidence to support a verdict in his favor on either of the claims. Moreover, the trial court did not err in granting any of the motions in limine and conducted the trial fairly.

BACKGROUND[1]

Ehirim began working for CalTrans as a range C transportation engineer in March 1993. Five years later, he became a professional engineer registered to practice civil engineering in California. Siong Yap began supervising Ehirim in the field construction unit somewhere between 2002 and 2004. Over the years there were between 10 and 15 employees in the unit.

Transportation engineers at CalTrans are classified as range A, B, C, or D. Working titles for these jobs include resident engineer, assistant resident engineer, and inspector. The minimum classification for a resident engineer is range D. However, someone classified as a range D transportation engineer can work as a resident engineer,

---

[1] These facts are taken from the evidence presented to the jury at trial. We do not consider the factual assertions contained in Ehirim's briefs that are not supported by the evidence at trial.

assistant resident engineer, or inspector. Assistant resident engineers and inspectors are interchangeable and perform the same functions.

The resident engineer is responsible for overseeing the whole project, including overall contract management and administration, which involves ensuring that the work does not exceed the budget and is performed in compliance with CalTrans's standards. Every project has only one designated resident engineer, who may delegate duties to a subordinate. Other engineers working on the project act as assistant resident engineers or inspectors. Inspectors perform routine duties on a project including writing diaries and ensuring that the contractor is doing his or her job. Assistant resident engineers manage the day-to-day administration of a project and can communicate with the contractor and other sections within CalTrans. Although resident engineers are tasked with more responsibility, resident engineers and inspectors are paid the same. All resident engineers in the unit worked at various times as inspectors.

Ehirim started working as a resident engineer in 2004. He remained a range D transportation engineer at the time of trial in March 2017. From 2004 to 2011, Ehirim worked as a resident engineer on many small projects costing $1 million or less but had not worked on any project worth more than $10 million. In 2014 and 2015, he worked on two projects as the resident engineer. One was budgeted at $500,000. Larger projects generate more opportunities for resident engineers to learn, even though they are not necessarily more complicated. Ehirim was not assigned as a resident engineer on any project from either 2011 or 2012 through 2014. The projects Ehirim worked on as either a resident engineer or an inspector did not run more over budget or later than any other

engineer's projects. Ehirim has not received any negative evaluations while employed with CalTrans.

Yap, in consultation with his manager, was responsible for assigning resident engineers to projects. Employees had to demonstrate that they were interested in volunteering for the projects. In staff meetings in October and December 2013 and January 2014, Yap sought volunteers for several resident engineer positions.

Over the years, Ehirim interviewed for over 100 CalTrans positions that he considered to be promotions. The general policy at CalTrans was to advertise vacant job positions considered to be promotions. Ehirim thought all open positions had to be filled through advertisement of their availability. Because Ehirim was not a supervisor, he never participated in the hiring process himself and acquired his knowledge of the process from reading a CalTrans manual.

In March 2013, Ehirim's manager, Frederico Valencia transferred Vu Nguyen, a professional engineer, into Ehirim's unit. The position Nguyen filled was not advertised. Nguyen was assigned to projects in Ehirim's unit as a resident engineer. Ehirim previously had been the resident engineer on a project that was reassigned to Nguyen.

In April 2013, Valencia requested a temporary out-of-class assignment for Nahro Saoud to fill a senior transportation engineer position in the utility relocation unit for three months. The unit had been without a senior transportation engineer for months. After Valencia was unsuccessful in attempting to backfill the position with a permanent position, his only options to fill the position were to rotate his current first-line supervisors through the position or to fill it with an out-of-class assignment. Although

Valencia could not recall whether the position was advertised or whether he interviewed Saoud for the position, Ehirim testified that the position was filled without being advertised or having interviews conducted. According to Valencia, Saoud was selected for the position because of his experience and expertise with utilities and working on larger projects as a resident engineer.

During a staff meeting in October 2014, Yap discussed an upcoming project involving the I-10 freeway that would take two years to complete and cost from $34 million to over $40 million. Yap asked if anyone was interested in volunteering for the I-10 project, and Ehirim was the only resident engineer interested. According to Ehirim, the position offered him the opportunity to learn and gain the experience needed to be promoted to a senior transportation engineer. Working exclusively as an assistant resident engineer or inspector will not provide Ehirim the experience to be promoted to a more senior position. Ehirim thought Yap assigned the I-10 project to him during the meeting. Neither Yap nor Kee Ooi, another engineer in the unit who attended the meeting, recalled Yap assigning anyone to the project at that meeting. The meeting notes include a tally of votes of engineers interested or uninterested in volunteering for the project.

Yap later announced that he had been assigned as the resident engineer for the I-10 project. The area construction manager assigned Yap to the job because the complexities

of the project necessitated that it be run by a senior transportation engineer.[2] Another project Yap had been working on was winding down, and he had previously worked as a resident engineer on a similarly complex project costing approximately $30 million.

Ehirim and other resident engineers in the unit worked on the I-10 project as assistant engineers or inspectors. Fereydoon Alipanah, another resident engineer working in the same unit as Ehirim, started on the project as an assistant resident engineer. The deputy district director elevated Alipanah to the resident engineer position in September 2015. Prior to the assignment, Alipanah had worked on a project costing approximately $30 million. Ehirim continued working as an inspector on the project, assisting Alipanah. For a three-year period including the I-10 project, Ehirim primarily worked the night shift on projects.

Engineers working in Ehirim's unit had work cell phones assigned to them and would use them to perform job responsibilities such as communicating with contractors, the California Highway Patrol, the traffic management center, the resident engineer, and other CalTrans staff. In May 2011, Ryan Houssein, CalTrans Telecommunication Property Analyst, emailed Ehirim asking him to turn in his work cell phone at the request of management and because of "financial cut-backs." Belinda Bourgeois, Administrative Services Manager, and Yap were copied on the email. Ehirim responded that he would comply but asked for more detail about why the phone was being taken away and for guidance on whether he would be compensated for using his personal cell phone for

[2] Yap thought Valencia assigned him to the project, but Valencia retired in August 2014, months before the assignment.

business purposes. Bourgeois directed Ehirim to "address your questions to your supervisor [Yap]" and added, "[Houssein] and I had nothing to do with the final decision." Though Yap was aware that Ehirim's work cell phone had been recalled, it had not been Yap's decision to do so. Yap did not have the final decision-making authority over taking away any employee's phone. Valencia, Yap's supervisor at the time, also could not recall who chose which employees had to return their cell phones. Yap thought the decision came from someone within administration based on a state policy implemented during a budget cut. Ehirim believed his phone was taken away in retaliation for his previous lawsuits.

Around the same time Ehirim's phone was recalled, another employee in the unit, Al Torrari, had his work cell phone recalled and used his personal cell phone to conduct business. Yap could not recall the duration of the recall of Torrari's phone. Between 2013 and 2015, Ehirim believed all of the other engineers and inspectors in his unit had their own cell phones.

Employees return their work cell phones to Yap while on vacation or extended leave. The phones were either returned to administration to be distributed to other employees or distributed by Yap to other employees directly. Yap thought Ehirim may have availed himself of the shared cell phone a few times. Ehirim never asked Yap if he could use his colleagues' cell phones while they were on leave.

Once Ehirim did not have a dedicated work cell phone, he used his personal cell phone to conduct business. While Ehirim was out in the field, Yap explained to him that arrangements were made for him to use other people's cell phones. Ooi loaned his cell

phone to Ehirim sometimes. Ehirim explained that he could not share other inspectors' phones while in the field because he drove in a car by himself. Alipanah called inspectors on both their work cell phones and their personal cell phones.

Yap told Ehirim that he could seek reimbursement for using his personal cell phone for business purposes. Ehirim never filed for reimbursement. Ehirim also never asked Yap to return his phone.

The computers in Ehirim's unit were upgraded in 2013. The information technology department was responsible for upgrading employees' computers. The computer Ehirim used was not upgraded and was outdated. Using an outdated computer made it difficult for Ehirim to complete tasks. Ehirim never confronted Yap about why his computer was not updated because he did not want "to create workplace violence."

Throughout the years, Yap made several comments to Ehirim that Ehirim found offensive. On one occasion, Ehirim requested permission to attend to a family emergency and was told, "I'm sick and tired of you." Yap once referred to Ehirim as a "so-called" engineer at a staff meeting. When Ehirim complained in a staff meeting that staff were not being treated equally, Yap remarked, "[I]f you don't like the way you've been treated you can leave the unit."

Ehirim filed lawsuits against CalTrans in 2001 and 2009 and filed numerous complaints with the Equal Employment Opportunity Commission (EEOC) over the years. According to Yap, Ehirim never told Yap about the complaints he filed. Yap could not recall responding to any complaint of discrimination filed by Ehirim about him. When an employee in Yap's unit files a discrimination or retaliation complaint, Yap is not made

aware of it initially for purposes of confidentiality. Rather, the complaint is processed by the Equal Employment Office (EEO) unit first, and a supervisor may become aware of it later in the investigation. The EEO unit did not interview Yap about any of Ehirim's complaints. Valencia could not recall any conversations with Yap about prior lawsuits or complaints filed by Ehirim. Valencia also could not recall being sued by Ehirim in 2009 or Ehirim ever telling him that he had previously sued CalTrans.

In April 2015, Ehirim filed the instant complaint for damages against CalTrans under FEHA, alleging that he had been harassed on the basis of his race and retaliated against for the previous complaints and lawsuits he had filed. He also alleged causes of action for invasion of privacy and breach of fiduciary duty. The trial court dismissed the breach of fiduciary duty claim after sustaining CalTrans's demurrer. The invasion of privacy claim survived until it was dismissed before trial on a motion in limine. The FEHA causes of action went to trial in March 2017. After Ehirim put on his evidence and rested his case, CalTrans orally moved for nonsuit. The motion was granted, and judgment was entered against Ehirim. He timely appealed from the judgment.

DISCUSSION

I. *Nonsuit Motion*

Ehirim contends that the trial court erred in granting the nonsuit motion on his retaliation and hostile work environment claims after he presented his case-in-chief. We disagree.

A. *Standard of Review*

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; Code Civ. Proc., § 581c, subd. (a).) The evidence is evaluated in the light most favorable to the plaintiff. (*Nally*, *supra*, at p. 291.) In determining the sufficiency of the evidence, we do not consider the credibility of the witnesses or weigh the evidence. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 118.) "Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded." (*Ibid.*) Every legitimate inference drawn must be indulged in plaintiff's favor. (*Ibid.*) "Although a judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is 'some substance to plaintiff's evidence upon which reasonable minds could differ.'" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.) In reviewing a judgment of nonsuit, we consider only those grounds specified by the moving party in support of its motion (*ibid.*) unless "it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion." (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 94.)

B. *No Prima Facie Case of Retaliation*

FEHA makes it an unlawful employment practice for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden" under FEHA or because the person has filed a complaint under

FEHA. (Gov. Code, § 12940, subd. (h).) To establish a prima facie case of retaliation, "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

To show that an adverse employment action is causally linked to the employee's protected activity, "the causal link element may be established by an inference derived from circumstantial evidence. A plaintiff can satisfy his or her initial burden under the test by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388.) Employer awareness is essential to establishing the causal link. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69 (*Morgan*).)

There is no dispute that Ehirim engaged in protected activity by suing CalTrans in 2001 and 2009 and filing numerous complaints with the EEOC. Assuming for the sake of argument that Ehirim introduced sufficient evidence that he was subjected to at least one adverse employment action, we consider whether there is any evidence of a causal link between the putative adverse employment action and his protected activity.

Ehirim has not demonstrated that his immediate or second-line supervisors knew about his prior lawsuits or complaints. Ehirim did not tell Yap about the EEOC complaints he filed. Valencia could not recall Ehirim telling him that he previously sued

CalTrans. Nor could Valencia recall being sued by Ehirim in 2009. The EEO unit did not interview Yap about Ehirim's 2009 complaint, and Yap could not recall responding to any complaint of discrimination filed by Ehirim about him. The testimony of Yap and Valencia was not refuted.

Ehirim claims that Yap lied about not having any knowledge of Ehirim's prior lawsuits or complaints. This may be true but is irrelevant to our analysis. Considering the credibility of witnesses is not within our purview in determining the sufficiency of the evidence. (*Campbell v. General Motors Corp.*, *supra*, 32 Cal.3d at p. 118.) If there was more than a scintilla of evidence contradicting Yap's and Valencia's claimed lack of knowledge, we would accept that more favorable evidence to Ehirim as true and disregard the conflicting evidence. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1214.) There is no evidence directly or indirectly refuting Yap's or Valencia's testimony disclaiming knowledge of Ehirim's prior complaints or lawsuits.

Ehirim claims that CalTrans's 2014 response to the EEOC complaint underlying this action establishes that Yap must have had the requisite knowledge of the prior actions. Ehirim urges that the responses could have only come from Yap, thus proving that Yap would have been aware of the 2009 lawsuit. The response, however, was not admitted. Evidence not before the jury cannot be relied upon to establish the sufficiency of the evidence to support a claim for retaliation.

Moreover, no evidence was presented from which the jury could reasonably infer that either Yap or Valencia would have necessarily known about the prior lawsuits or complaints by virtue of their positions alone. (See *Wysinger v. Automobile Club of*

Southern California (2007) 157 Cal.App.4th 413, 421.) To that end, Yap testified that the EEO unit was wholly separate from his unit and handled employee complaints exclusively without involving supervisors initially because of confidentiality concerns. Yap said he was not interviewed by the EEO unit about Ehirim. No contradictory evidence was presented about how CalTrans handled employee complaints.

In sum, the only legitimate inference that can be drawn from the evidence is that neither Yap nor Valencia knew about Ehirim's prior protected activity. In the absence of evidence that the individuals who took the allegedly adverse employment actions against Ehirim were aware of his past protected activity, "the causal link necessary for a claim of retaliation can not be established." (*Morgan*, *supra*, 88 Cal.App.4th at p. 73.)

Because Ehirim failed to present any evidence that his supervisors knew of his prior protected activity, he failed to demonstrate any causal connection between his protected activity and the subsequent allegedly adverse employment actions. We therefore conclude that the trial court properly granted nonsuit on the retaliation claim.

C. *No Prima Facie Case of Hostile Work Environment*

It is an unlawful employment practice for an employer or any other person in the workplace to harass an employee on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." (Gov. Code, § 12940, subd. (j)(1).) Whereas discrimination involves bias in the exercise of official actions on behalf of the employer, harassment encompasses "situations in which the *social environment* of the workplace

becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.) Harassment includes verbal conduct such as derogatory remarks. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461; Cal. Code Regs., tit. 2, § 11019, subd. (b)(2)(A).) The harassment must be severe or pervasive enough to create an objectively hostile or abusive work environment and must be more than occasional, isolated, sporadic, or trivial. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130-131.)

The major issue presented is whether, if all legitimate inferences favorable to Ehirim are made, the evidence is sufficient to support his claim that he was subjected to a hostile work environment based on his race. Ehirim suffered three instances of verbal harassment over the years: (1) Yap told Ehirim "I'm sick and tired of you" when Ehirim asked to leave work because of a family emergency; (2) Yap referred to Ehirim as a "so-called engineer" in a staff meeting; and (3) when Ehirim complained in a staff meeting that staff were not being treated equally, Yap remarked, "[I]f you don't like the way you've been treated you can leave the unit." Viewed in the light most favorable to Ehirim, these comments are insulting and demeaning and demonstrative of a tense relationship between a supervisor and an employee. However, FEHA does not proscribe incivility between employers and employees and is not intended to shield employees from any harsh or unfavorable treatment at the workplace. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 295 (*Lyle*).) Conduct that merely offends but does not create a work environment that is hostile or abusive on the basis of a

protected status is not prohibited by FEHA. (*Ibid.*) Here, there is no evidence—direct or circumstantial—that the offensive comments were directed at Ehirim because of his race.[3] The comments themselves are not derogatory racial epithets, nor do they connote any sort of race-based animosity. Nothing suggests Ehirim was harassed because of his race. Even assuming (on the basis of no evidence) that Ehirim and Yap are not of the same race, that assumption would not give rise to an inference that the harassment was because of Ehirim's race. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1118 ["The mere fact [the supervisor] is a female and plaintiff a male does not give rise to the inference that her alleged aggressive conduct was motivated by a desire to discriminate on the basis of gender."].)

The other evidence Ehirim contends establishes that he was subjected to hostile environment harassment includes having his cell phone removed, not having his computer upgraded, not being promoted, not being assigned to a large project, and having the I-10 resident engineer assignment taken away. Here too, there is no evidence that Ehirim was subjected to these conditions of employment *on the basis of his race*. To the contrary, in his direct testimony, Ehirim testified that he was subjected to all of these conditions of employment because he was being retaliated against for engaging in protected activity. Not once did he mention that he was targeted because of his race.

---

3 In its oral motion for nonsuit, CalTrans did not argue that the harassment claim failed because there was no evidence establishing the harassment was because of Ehirim's race. While we ordinarily would not address this argument raised for the first time on appeal, it is clear that this defect is not one that could have been cured had it been called to Ehirim's attention. (*Lawless v. Callaway*, *supra*, 24 Cal.2d at p. 94.)

With respect to his cell phone being removed, for example, Ehirim said, "My phone was removed to cause harm, to frustrate me and make me leave the unit or to quit CalTrans. This was also a retaliation for having filed previous lawsuits."[4] No harassment rises to the level of being actionable under FEHA unless it results from the employee's protected status. (*Lyle, supra*, 38 Cal.4th at p. 295.)

Any inference attributing the offensive commentary and other conduct to racial bias would be mere speculation. Speculation is insufficient to sustain a FEHA racial harassment claim. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009; see also *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1118 [speculation insufficient to support gender discrimination claim].)

Because no evidence was submitted from which it could be inferred that Ehirim was subjected to harassment based on grounds prohibited by FEHA, we conclude that the trial court properly granted nonsuit on the harassment claim.

---

[4] In this vein, we note that Ehirim does not suggest in either of his appellate briefs that the putatively harassing conduct or commentary had anything to do with his race. The section entitled "Statement of the Case" in his opening brief, by way of example, focuses exclusively on his being targeted for engaging in protected activity. In its entirety, that section reads: "Appellant commenced this case by the filing of his Complaint for Damages for Retaliation, Hostile Work Environment, harassment, Invasion of Privacy and Breach of Fiduciary Duty. Appellant alleged that respondent retaliated against him for engaging in protected activity, specifically for having filed previous employment and discrimination lawsuits against respondent, *created a hostile work environment, harassment for the appellant because appellant engaged in protected activity*, and invaded the appellant's privacy by removing his state issued cell phone and requiring appellant to use his private cell phone for respondent's public work." (Italics added.) Consistent with this statement, Ehirim does not mention in either his opening brief or his reply brief that anything he experienced at work was *because of* his race.

II. *Motions in Limine*

Ehirim contends that the trial court erred in granting several of CalTrans's motions in limine before trial, resulting in the dismissal of his invasion of privacy claim and otherwise prejudicially affecting the trial. We disagree.

A. *Expert Witness Testimony*

Ehirim first contends that the trial court erred in excluding the expert testimony of Dr. Duane A. Collins, M.D. This contention fails on the merits.

Upon the demand of any party, all parties must exchange written information about their expert trial witnesses. (Code Civ. Proc., § 2034.210.) The information must include, among other things, "the name and address of a person whose expert opinion that party expects to offer in evidence at the trial." (Code Civ. Proc., §§ 2034.260, subd. (b)(1), 2034.300.) The disclosure must happen on or before the specified date of exchange. (Code Civ. Proc., § 2034.260, subd. (a).)

Section 2034.300 of the Code of Civil Procedure empowers the trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to timely designate the witness. We review the trial court's ruling on a motion to exclude expert testimony and its reasonableness determination under section 2034.300 for abuse of discretion. (*Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1445; *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.)

CalTrans moved in limine to exclude the expert testimony of Dr. Collins based on Ehirim's failure to designate any expert witnesses by the September 19, 2016, deadline

set by the parties.[5] Ehirim filed an opposition on February 27, 2017, attaching a purported expert witness designation for Dr. Collins. Ehirim conceded at the hearing that he did not timely designate Dr. Collins. He claimed to be waiting for CalTrans to depose Dr. Collins first as a nonexpert before designating him. The reporter's transcript contains references to CalTrans's attempt to depose Dr. Collins and Ehirim's motion to quash it, but the clerk's transcript does not contain any of the corresponding documentation. It is therefore impossible to evaluate this claim. Regardless, Ehirim was not excused from compliance with the expert witness designation deadline because CalTrans sought to depose Dr. Collins as a nonexpert. If Ehirim thought he might want Dr. Collins to testify as an expert, he should have acted prudently and timely designated him as such. There is no other evidence tending to show that the failure to comply was reasonable. We therefore cannot say that the trial court abused its discretion in determining that the failure to timely designate Dr. Collins as an expert was unreasonable.

Moreover, the expert witness designation five months late and one week before trial did not cure the failure. To start, Ehirim did not comply with the statutory provisions governing tardy designation. (See Code Civ. Proc., §§ 2034.710, 2034.720.) Nor could his expert witness designation one week before trial satisfactorily provide CalTrans the proper amount of time "to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who

---

[5] The record on appeal does not include the demand for exchange of expert witness designation. We therefore must assume that the demand was timely made and properly specified September 19, 2016, as the date of exchange. (Code Civ. Proc. §§ 2034.220, 2034.230, subd. (b).)

can respond with a competing opinion on that subject area." (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.)

For all of these reasons, we conclude that the trial court did not abuse its discretion in excluding the expert testimony of Dr. Collins for Ehirim's failure to timely designate him.

B. *Conduct Occurring Before March 1, 2013*

Ehirim contends that the trial court erred in granting CalTrans's motion in limine to preclude him from introducing evidence of wrongful conduct occurring before March 2013. We disagree.

Under FEHA, a plaintiff must exhaust his or her administrative remedies by filing a written charge with the California Department of Fair Employment and Housing (DFEH) within one year of the alleged harassment or retaliation and obtain a right to sue letter before filing suit. (Gov. Code, § 12960.) Exhaustion is a jurisdictional prerequisite to filing in court. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) "The scope of the written administrative charge defines the permissible scope of the subsequent civil action. (*Yurick* [*v. Superior Court* (1989)] 209 Cal.App.3d [1116, 1121-1123].) Allegations in the civil complaint that fall outside of the scope of the administrative charge are barred for failure to exhaust." (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 897.) Uncharged conduct that could reasonably be expected to be discovered through administrative investigation of the charged conduct, however, may be included in a subsequent action. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1615.)

Ehirim filed his complaint with the EEOC on October 21, 2013,[6] complaining about discriminatory and retaliatory conduct that started at "[e]arliest" on March 1, 2013, and continued through the filing date. In further explaining the particulars of the charge, he alleged, "From on or about 03/01/2013, through the present, I have been subjected to different terms and conditions of employment by Siong Yap, Senior Transportation Engineer, that included, but was not limited to, not being issued an upgraded computer, denying me the position of Acting Senior Transportation Engineer, reassigning me from a Professional Engineer to an . . . Inspector, and telling me 'If you don't like the wa[y] you['re] being treated you should leave.'" It is reasonable to assume that a complaint alleging conduct that began on or around March 1, 2013, would result in an investigation that might uncover conduct that occurred a short time earlier, but not years earlier. The courts have long interpreted the phrase "'on or about'" to mean "either the day mentioned or a day in very near proximity thereto." (*Boscus v. Waldmann* (1916) 31 Cal.App. 245, 258; *Childs v. State of California* (1983) 144 Cal.App.3d 155, 160.) Moreover, the complaint did not include any allegation about the recall of Ehirim's cell phone, which reasonably could have led to the discovery that the recall happened in June 2011. Given the allegations in the EEOC complaint, an investigation could not reasonably be expected to have uncovered conduct occurring two years before the specific date that Ehirim alleged.

---

6 The EEOC complaint also names the DFEH.

Ehirim argues that the continuing violations doctrine excuses the failure to exhaust. That doctrine, however, is inapplicable here. The continuing violations doctrine provides an equitable exception to the one-year statute of limitations for FEHA actions. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824.) The one-year deadline may be tolled if the plaintiff demonstrates that at least one act occurred within the filing period and that the discriminatory or harassing conduct was the product of a persistent ongoing pattern, rather than isolated or sporadic acts. (*Morgan, supra*, 88 Cal.App.4th at p. 64.) The issue here is not whether the statute of limitations prevented Ehirim from bringing a claim based on conduct occurring before March 2013. Rather, the problem is that Ehirim failed to exhaust his administrative remedies with respect to that conduct. There is no continuing violations exception to the administrative exhaustion requirement.

In sum, because the administrative complaint did not include conduct occurring before March 2013 and an investigation could not reasonably be expected to lead to discovery of that conduct, we conclude that the trial court properly granted the motion in limine to exclude evidence of conduct before that date for failure to exhaust administrative remedies under FEHA.

C. *Invasion of Privacy Claim*

Ehirim contends that the trial court erred in granting a motion in limine dismissing his invasion of privacy claim for failure to exhaust his administrative remedies. We reject this contention.

Courts have the inherent power to dispose of a claim by a motion in limine. "[W]e review the result as we would the grant of a motion for nonsuit after opening statement,

keeping in mind that the grant of such a motion is not favored, that a key consideration is that the nonmoving party has had a full and fair opportunity to state all the facts in its favor, and that all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595.)

The Government Claims Act sets forth several preconditions to filing suit against a government entity. A government claim must be timely filed with the public entity before a tort action may commence against the entity. (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 843; Gov. Code, § 945.4.) If the entity does not act on the claim within 45 days, then it is deemed rejected. (Gov. Code, § 912.4, subds. (a) & (c).) Only after the public entity has acted upon or is deemed to have rejected the claim may the aggrieved party bring a tort cause of action against the entity. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 209, superseded by statute on other grounds as stated in *A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1258.)

Ehirim filed his complaint in the superior court 22 days after filing his original government claim and one day after submitting supplemental information to the DFEH. He does not dispute any of these facts. The claim presentation requirement therefore was not satisfied. (See *Shirk v. Vista Unified School Dist.*, *supra*, 42 Cal.4th at p. 209.)

Because the claim presentation requirement was not satisfied, we affirm the trial court's judgment and conclude that the court properly granted the motion in limine to exclude the invasion of privacy claim.[7]

D. *Timeliness of Motions in Limine*

Ehirim contends the trial court erred in failing to deny all of the motions in limine because he was not timely served with the motions as prescribed by section 1005 of the Code of Civil Procedure. This contention fails.

Section 1005 of the Code of Civil Procedure is inapplicable. Section 1005 sets forth the filing deadline and requirements for a list of enumerated motions and "[a]ny other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge." (Code Civ. Proc., § 1005, subd. (a)(13).) Motions in limine are not among the motions listed. Nor do they fall within the catch-all provision because they "need not be accompanied by a notice of hearing." (Cal. Rules of Court, rule 3.1112(f).)

Here, the motions in limine were timely filed in compliance with the local rules of court. They were served and filed on February 15, 2017—eight days before the trial readiness conference on February 23, as required by the local rules. (See Super. Ct. San

---

[7] Ehirim lists as one of his "Issues on Appeal" that the trial court "erred in granting [CalTrans's] motion[ ] in limine . . . 5—to exclude promotions that [Ehirim] did not receive prior to March 1, 2013." However, Ehirim's brief presents no arguments in support of this claim of error. We therefore deem the point waived and will not address it. (See *R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co.* (2007) 154 Cal.App.4th 796, 801, fn. 3.)

Bernardino County, Local Rules, rule 411.2 [motions in limine to "be in writing and filed with service completed at least 8 days before the [trial readiness] conference"].)

Ehirim further contends that he was personally served with the motions in limine on February 23, 2017, not February 15, 2017, as attested in the proofs of service. The trial court did not address this contention or resolve the factual dispute. Nor do we. Assuming Ehirim was not properly served, any error was harmless. Ehirim filed his opposition papers on February 27, and the motions were entertained on their merits one week later.

III. *Overall Fairness of the Trial*

Lastly, Ehirim claims the trial was fundamentally unfair, focusing primarily on the trial court's management of the length of time taken to present the case-in-chief. He also contends that the trial court demonstrated bias toward him because he was representing himself. We reject both of these contentions.

"[A] court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it." (*People v. Engram* (2010) 50 Cal.4th 1131, 1146; *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377; Code Civ. Proc., § 128, subd. (a)(3).) This authority includes the power to supervise and manage the length of the trial from the outset. (*Engram, supra*, at p. 1146; *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22 (*California Crane School*).)

At the trial readiness conference, Ehirim stated that his part of the trial would take two to three days. He started presenting his case on March 7, 2017. That afternoon,

outside the presence of the jury, the trial court expressed concern about whether Ehirim would be able to present his case in the projected time because Ehirim's first witness, Yap, was on the stand for nearly the full day. Ehirim was warned that the court would declare a mistrial if Ehirim exceeded the time estimate given to the jury. The following afternoon Ehirim rested his case. Ehirim was able to present all of his witnesses. None of their testimony was cut off or shortened. Nor does Ehirim contend otherwise. Ehirim had a full and fair opportunity to present his case. The trial court acted well within its authority to control the proceedings by reminding Ehirim of the estimated projected length of trial he gave at the outset and holding him to it. (*California Crane School*, *supra*, 226 Cal.App.4th at p. 22.)

Ehirim also claims that we must reverse because the trial court exhibited bias against him as a pro se litigant. In support of this contention, Ehirim lists numerous perceived irregularities, including the trial court sustaining objections made by CalTrans, overruling his objections, correcting his grammar, inviting CalTrans to object to his exhibits, and not allowing him to introduce exhibits.[8] While pro se litigants are not entitled to special treatment (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985), they, like all parties, are entitled to an objective decision maker who is both fair and impartial (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 390). The fact that the trial court ruled against Ehirim does not in itself show bias or prejudice on behalf of

---

[8] To the extent Ehirim challenges the listed evidentiary rulings as erroneous, we consider the arguments waived because they are not supported by legal argument or authority. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.)

the trial court against Ehirim. (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 674.) Ehirim also claims that the trial court showed bias by correcting Ehirim's grammar. But the trial court did not correct Ehirim's grammar. Alipanah testified that he had been "assigned" to the I-10 project, not "reassigned," which is what Ehirim insisted happened in his questioning. Upon further questioning about the "reassignment," the trial court merely directed Ehirim to describe the testimony accurately. The trial court did not correct Ehirim's grammar. This conduct does not demonstrate that the trial court exhibited any bias or prejudice against Ehirim. In sum, we conclude that the trial court did not act unfairly.

DISPOSITION

We affirm the judgment. Respondent shall recover its costs of appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

RAMIREZ
P. J.

MILLER
J.